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**U.S. Department of Homeland Security
Citizenship and Immigration Services**

*ADMINISTRATIVE APPEALS OFFICE
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File: EAC 02 163 50375 Office: VERMONT SERVICE CENTER

Date: APR 21 2004

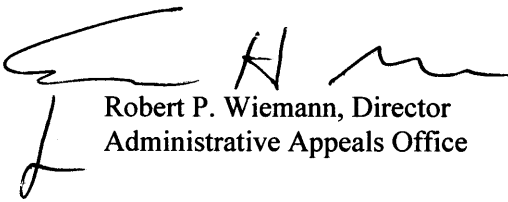
IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which equals \$21,603.40 per year.

The petition indicates that the petitioner's Federal taxpayer identification number is 54-1299932. With the petition, counsel submitted a draft of an unaudited 2001 profit and loss statement.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 27, 2002, requested additional evidence pertinent to that ability.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements and must demonstrate the ability to pay the proffered wage beginning on the priority date and continuing to the present. The Service Center noted that the petitioner could demonstrate the ability to pay the proffered wage during a given year by showing that its net income exceeded the proffered wage, that its year-end net current assets exceeded the proffered wage, or that the petitioner paid the beneficiary a salary during that year which exceeded the proffered wage.

In response, counsel submitted a 2001 W-2 form showing that Angels 3 LLC paid \$14,200 to the beneficiary during that year. Counsel also submitted a copy of the 2001 Form 1065 U.S. Return of Partnership Income of Angels 3 LLC. All of those documents indicate that the Federal taxpayer identification number of Angels 3 LLC is 52-2008170. The tax return shows that Angels 3 LLC declared a loss of \$7,095 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year Angels 3 LLC's current liabilities exceeded its current assets.

Finally, counsel submitted a copy of an April 2001 checking account statement of Angels3 LLC T/A Mama's Italian Restaurant. This office observes that Angels 3 LLC has the same address as the petitioner but a different Federal taxpayer identification number. The petitioner submitted evidence insufficient to show that it and Angels 3 LLC are the same entity.

The margins of the W-2 form contain notes indicating that the petitioner or counsel believed that Angels 3 LLC's depreciation deduction and total assets should be included in the determination of the petitioner's ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 26, 2002, denied the petition.

On appeal, counsel asserts that "enclosing (sic) contract (sic) Business is operating in Black. (sic) Signed a \$210,000. (sic) contract for Remodeling (sic) Just (sic) Recently (sic) See attached."

With that appeal, counsel submits what purports to be a contract executed between the petitioner and a builder. By the terms of that contract, the petitioner is obliged to pay \$210,000 for replacement of its front façade.

Counsel's reliance on the bank statement submitted is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the Angel 3 LLC's bank statements are available to the petitioner and yet somehow reflect additional available funds that were not reflected on its tax return.

Counsel's reliance on the amount of Angels 3 LLC's depreciation deduction is misplaced. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add the amount of a depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). A company's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. That amount may not now be shifted to some other year as convenient to the petitioner's present purpose, nor treated as a fund available to pay the proffered wage.

Counsel's reliance on Angels 3 LLC's total assets is similarly misplaced. Total assets are insufficiently liquid to be considered available to pay the proffered wage. Further, the entire amount of the petitioner's assets is not expected, during the ordinary course of business, to be converted to cash.¹ The petitioner's end-of-year net current assets are the only portion of the petitioner's assets that can be considered in determining the petitioner's ability to pay the proffered wage.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

Finally, counsel's reliance on the petitioner's contract to replace its façade is misplaced. The petitioner cannot show that it is able to pay the proffered wage by showing that it has entered into a contract obliging it to pay \$210,000 to a construction contractor. To the contrary, this contractual obligation evinces an additional liability.

Showing the amounts of the petitioner's various expenses is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income³, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, *Supra*; *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the Immigration and Naturalization Service, now CIS, should have considered income before expenses were paid rather than net income.

¹ An interest a the petitioner owns in the real estate upon which it conducts business, or business fixtures and chattels are examples of assets a company owns but does not convert to cash during the ordinary course of business.

² The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

³ The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

The priority date is March 21, 2001. The proffered wage is \$21,603.40 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 79 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 286 days. The proffered wage multiplied by 286/365th equals \$16,927.60, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, Angels 3 LLC declared a loss of \$7,095. The petitioner has not demonstrated the ability to pay any portion of the proffered wage during 2001 out of that income. At the end of that year, Angels 3 LLC had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage during 2001 out of those net current assets. Assuming that Angels 3 LLC is the same entity as the petitioner,⁴ the petitioner demonstrated that it paid the beneficiary \$14,200 during 2001. That amount is less than the salient portion of the proffered wage.⁵ The petitioner has not demonstrated that any other funds were available to it during 2001 with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the employment verification letter submitted to support the beneficiary's claim of two years of qualifying experience merely states that the beneficiary worked as head cook from 1997 to 1999. Depending upon the dates upon which the beneficiary began and ended that employment, the beneficiary may or may not have worked in that position for two years. Additionally, the letter fails to describe the beneficiary's duties as head cook. Thus, the experience verification letter fails to meet the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁴ This office makes this assumption only for the sake of argument. In fact, the evidence submitted was insufficient to show that the petitioner and Angels 3 LLC are the same entity, as was noted above.

⁵ Even if the amount the petitioner paid the beneficiary during 2001 had been greater than the pro-rated portion of the proffered wage that the petitioner must show the ability to pay during 2001, the amount paid during 2001 would have to have been pro-rated. The petitioner would have to demonstrate that the amount it paid to the beneficiary during the portion of 2001 after the priority date was greater than \$16,927.60.